

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL WAYNE YOST,

Defendant.

Case No. 2:07-cr-00145-KJD-PAL

REPORT OF
FINDINGS AND RECOMMENDATION

(M/Suppress - Dkt. #422)

This matter is before the court on defendant Michael Wayne Yost's Motion to Suppress Evidence for Fourth Amendment Violation (Dkt. #422) which was referred the undersigned for a report of findings and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-3 and IB 1-4. The court has considered the motion, the government's Response (Dkt. #462), and Yost's Reply (Dkt. #482).

BACKGROUND

Defendant Michael Wayne Yost ("Yost") is charged in a Superseding Indictment (Dkt. #181) with RICO conspiracy and drug conspiracy. In the current motion, he seeks to suppress evidence obtained from a search of a residence at 5920 Vicki Ann Road in Pahrump, Nevada, on June 28, 2006. The search warrant was applied for by Detective Trevor Meade of the Nye County Sheriff's Office and approved by Nye County Justice of the Peace Tina Brisebill.

A. Yost's Arguments

Yost asserts that the information Detective Meade provided to support this search warrant is too stale to support a finding of probable cause because all of the relevant events and alleged criminal activity related in the affidavit occurred in July and August of 2005, ten to eleven months prior to the application for the warrant. Second, Yost argues there was no probable cause to justify seizure of

1 computer equipment at the residence. Third, Yost contends the affidavit lacked probable cause to
2 authorize a search for items of personal property which would tend to establish the identity of persons
3 in control of the residence. Probable cause was lacking, Yost asserts, because ownership or control of
4 the residence is not evidence of a crime, and because officers knew Yost and his wife lived at the
5 address, therefore, seizure of these items was “not necessary to dispel any confusion or uncertainty as to
6 who lived at the address.” Motion, 12:21-24. Further, he argues that the affidavit fails to establish
7 probable cause that firearms and ammunition, items relating to gang activity, and evidence that Yost
8 was involved in the sale or production of narcotics would be found in the searched premises. As a
9 result, Yost argues that all evidence obtained or derived from the search of the residence at 5920 Vicki
10 Ann Road must be suppressed as the “fruit of the poisonous tree.”

11 **B. The Government’s Response**

12 The government response argues that the affidavit supporting the search warrant established
13 probable cause to believe the items specified would be found in the searched premises. The
14 government acknowledges that a warrant lacks probable cause if it is based on stale information.
15 However, the government contends that the affidavit as a whole establishes that Yost and co-defendant
16 Axtell were involved in an ongoing drug operation connected to a violent prison gang engaged in
17 racketeering activity. The government suggests that some of the items seized during execution of the
18 search warrant such as false identification documents were seen in plain view and, therefore,
19 appropriately seized. Finally, the government argues that even if the warrant was “flawed,” the
20 evidence in this case should not be suppressed under the good faith exception to the exclusionary rule
21 recognized by Supreme Court in United States v. Leon, 468 U.S. 897, 920 (1984).

22 Yost replies that Detective Meade’s conclusory statements are insufficient to establish probable
23 cause and that the results of the search cannot justify the initial seizure. He reiterates his arguments that
24 Detective Meade’s bare conclusions and statement of beliefs are insufficient to establish probable
25 cause, especially with respect to computer equipment seized at the Yost residence. Finally, he argues
26 that the good faith exception does not save this search warrant because the Justice of the Peace
27 abandoned her judicial role and acted as a rubber stamp for the police by issuing this warrant with
28 numerous deficiencies.

DISCUSSION

The Fourth Amendment secures “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” U.S. Const. amend. IV. The Fourth Amendment protects reasonable and legitimate expectations of privacy. Katz v. United States, 389 U.S. 347 (1967). The Fourth Amendment protects “people not places.” Id. Evidence obtained in violation of the Fourth Amendment, and evidence derived from it may be suppressed as the “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471 (1963).

A. Evidentiary Hearing

Yost’s motion to suppress contained a request for an evidentiary hearing in the caption but did not articulate any reason for conducting an evidentiary hearing. At a January 14, 2009 status conference in this case, the court inquired of counsel for Yost whether there were any contested issues of fact that required an evidentiary hearing, and counsel indicated that an evidentiary hearing was not required. However, at the February 27, 2009 status hearing, counsel advised the court that he had spoken with his client who wanted an evidentiary hearing. Aside from indicating his client wanted an evidentiary hearing, and that he believed an evidentiary hearing was warranted, counsel for Yost articulated no reasons why the court should conduct one.

The United States Court of Appeals for the Ninth Circuit has held that an evidentiary hearing on a motion to suppress need only be held if the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the court to conclude that contested issues of material fact exist. United States v. Howell, 231 F.3d 615, 620 (9th Cir. 2000), citing, United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986); United States v. Harris, 914 F.2d 927, 933 (7th Cir. 1990); United States v. Irwin, 613 F.2d 1182, 1187 (9th Cir. 1980); United States v. Carrion, 463 F.2d 704, 706 (9th Cir. 1972) (“Evidentiary hearings need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that relief must be granted if the facts alleged are proved.”). “A hearing will not be held on a defendant’s pre-trial motion to suppress merely because a defendant wants one. Rather, the defendant must demonstrate that a ‘significant disputed factual issue’ exists such that a hearing is required.” Howell, 231 F.3d at 621, citing, Harris, 914 F.2d at 933. The determination of whether an evidentiary hearing is appropriate rests

1 in the reasoned discretion of the district court. United States v. Santora, 600 F.2d 1317, 1320 (9th Cir.),
2 amended by 609 F.2d 433 (1979). Yost's motion does not allege that there are any significant disputed
3 factual issues. Rather, he has asked for an evidentiary hearing because he wants one. His moving
4 papers have not alleged any disputed or contested issues of material fact, and his request for an
5 evidentiary hearing is, therefore, denied.

6 **B. Probable Cause to Support a Search Warrant**

7 Probable cause is required to justify certain governmental intrusions upon interests protected by
8 the Fourth Amendment. See Ornelas v. United States, 517 U.S. 690, 695 (1996); Illinois v. Gates,
9 462 U.S. 213, 241 (1983). Probable cause to search exists when there is "a fair probability that
10 contraband or evidence of a crime will be found in a particular place," *i.e.*, the place to be searched.
11 Gates, 462 U.S. at 238. "Whether there is a fair probability depends upon the totality of the
12 circumstances, including reasonable inferences, and is a 'common sense, practical question.'" United
13 States v. Kelley, 482 F.3d 1047 (9th Cir. 2007), citing United States v. Gourde, 440 F.3d 1065, 1069
14 (9th Cir. 2006) (*en banc*).

15 A determination of whether probable cause exists is made by examining the totality of the
16 circumstances. Gates, 462 U.S. at 241. The Supreme Court has repeatedly emphasized that the
17 probable cause standard is a "practical, non-technical conception." Brinegar v. United States,
18 338 U.S. 160, 176 (1949). A probable cause determination is two-fold. First, a court must determine
19 "historical facts," that is, the events leading up to the stop or search. Ornelas, 517 U.S. at 696. Second,
20 the court must determine "whether those historical facts, viewed from the standpoint of a reasonable
21 police officer," amount to probable cause. A judge's decision regarding probable cause should be given
22 great deference. Id. at 698-99. The duty of a reviewing court is to ensure that the magistrate had a
23 substantial basis for concluding that probable cause existed. Id.; see also United States v. Neilsen,
24 371 F.3d 574, 579 (9th Cir. 2004). A reviewing court is required to examine all the circumstances set
25 forth in the affidavit, and in doubtful cases, to give preference to the validity of the warrant. United
26 States v. Peacock, 761 F.2d 1313, 1315 (9th Cir. 1985), cert. denied, 474 U.S. 874 (1985).

27 Facts supporting probable cause can come from several sources, including the observations of
28 law enforcement who use their expertise and training to draw inferences of criminal activity from

1 behavior that is not criminal on its face. See, e.g., Alford v. Haner, 446 F.3d 935, 937 (9th Cir. 2006)
2 (probable cause to arrest for impersonating officer where police observed police radio, scanner, and
3 handcuffs in car). Law enforcement can also use facts ascertained from a confidential informant. See,
4 e.g., United States v. Reeves, 210 F.3d 1041, 1045-46 (9th Cir. 2000) (probable cause for search
5 warrant even though informant had criminal record because informant had previously provided reliable
6 information). Moreover, a “magistrate may rely on the conclusion of experienced law enforcement
7 officers regarding where evidence of a crime is likely to be found.” United States v. Fannin,
8 817 F.2d 1379, 1381 (9th Cir. 1987). An officer need not include all information in his possession to
9 obtain a search warrant, but instead, need only show facts adequate to support a finding of probable
10 cause. United States v. Johns, 948 F.2d 599, 605 (9th Cir. 1991). “Trustworthy information” must be
11 used to support a probable cause determination and can include a tip from an informant so long as the
12 tip is reliable. See Gates, 462 U.S. at 283. Reliability may be shown by the informant’s past record of
13 reliability, through independent confirmation, personal observation by law enforcement, or other means.
14 See Alabama v. White, 496 U.S. 325 (1995).

15 When a search warrant is based solely on an informant’s tip, the “proper analysis is whether
16 probable cause exists from the totality of the circumstances to determine a sufficient level of reliability
17 and basis of knowledge for the tip.” United States v. Bishop, 264 F.3d 919, 924 (citing Gates, 462 U.S.
18 at 238). One of the factors that courts consider is the informant’s basis of knowledge – that is “how
19 the informant came by his or her knowledge.” Id. at 925 (citing United States v. Angulo-Lopez,
20 791 F.2d 1394, 1396 (9th Cir. 1986)). In Bishop, the Ninth Circuit found that because the informant
21 had first-hand knowledge that the defendant had “cooked” methamphetamine the day before the
22 application for the search warrant was made, the informant’s tip was more reliable. “The veracity of an
23 informant’s information is also considered when reviewing the totality of the circumstances.” Id. at
24 925. A court may find an informant’s information is reliable based on independent police corroboration
25 of the information provided by an informant. Id., citing United States v. Freitas, 716 F.2d 1216, 1222
26 (9th Cir. 1983). A court may also consider whether an informant’s information is an admission against
27 penal interest in evaluating the reliability of the informant’s information. Id., citing United States v.
28 Harris, 403 U.S. 573, 583-84 (1971).

1 A redacted application and affidavit for this search warrant is attached as Exhibit "A" to Yost's
2 motion to suppress. Yost filed a Motion to Compel (Dkt. #163) seeking to compel the government to
3 produce the search warrant affidavit and related materials. The search warrant was sealed by the
4 issuing state court judge. The government filed a Response (Dkt. #169), asserting the confidential
5 informant privilege recognized in Roviaro v. United States, 353 U.S. 53 (1957). The government also
6 asserted that inasmuch as the state judge had issued the warrant and had entered an order sealing it,
7 government counsel did not have a copy of the search warrant application. The government objected to
8 unsealing the affidavit supporting the search warrant based on its concerns for the informant's safety
9 and the integrity of its ongoing investigation. At a hearing conducted April 4, 2008, the court directed
10 the government to show good cause why the affidavit supporting the search warrant at the defendant's
11 residence which uncovered evidence that the government intends to introduce in this case should
12 remain under seal. Counsel for the government submitted a Declaration of Trevor Meade (Dkt. #229)
13 supporting the government's request to keep the affidavit under seal. In it, Detective Meade averred
14 that the affidavit contained information concerning a confidential informant who provided information
15 to investigators in the case. The affidavit outlined his experience with the Aryan Warriors' membership
16 and activity in the Pahrump valley, gave examples of violent incidences involving the Aryan Warriors
17 in the Pahrump area and opined that if the identity of the confidential informant was disclosed, he or
18 she would targeted for murder.

19 At a hearing conducted May 21, 2008, the undersigned directed the government to obtain a copy
20 of the affidavit supporting the search warrant for *in camera* review. The government applied for, and
21 received, an order from Judge Brisebill, unsealing the affidavit for the undersigned's review *in camera*.
22 At a hearing conducted August 8, 2008, the court indicated its intention to order a redacted copy of the
23 search warrant affidavit be produced to counsel for Yost, redacting any information that might identify
24 the confidential informant. Counsel for the government indicated she did not oppose production of an
25 appropriately redacted affidavit and that she would be meeting with Detective Meade to propose
26 redactions to the affidavit. The undersigned received a redacted version of the affidavit August 13,
27 2008 and reviewed it *in camera*. The court compared the original sealed affidavit of Detective Meade
28 with the redacted version of the affidavit and found that the redactions pertained to information about

1 the confidential informant, the disclosure of which could identify the confidential informant. The court
2 also found that disclosing the unredacted portions of the affidavit, which contained information which
3 could effectively reveal the identity of the confidential informant, would endanger the confidential
4 informant. Accordingly, the court granted in part and denied in part Yost's motion to compel. The
5 court required the government to serve counsel for Yost with a copy of the redacted version of the
6 affidavit submitted to the court *in camera* on August 13, 2008 and denied the motion in all other
7 respects. See Order (Dkt. #352). Yost did not object to this procedure or the undersigned's rulings as
8 permitted by 28 U.S.C. § 636(b)(1)(A) and LR IB 3-1.

9 The court has reviewed the unredacted version of the affidavit *in camera*, as well as the redacted
10 affidavit which counsel for Yost received and attached to his motion to suppress. Detective Meade's
11 affidavit related that he was employed by the Nye County Sheriff's Office and assigned to the Pahrump
12 substation since March 1999. The affidavit outlined his training and experience in narcotics
13 investigations and sought judicial authorization to search a residence at 5920 Vicki Ann Road in
14 Pahrump, Nye County, Nevada. The affidavit requested permission to search for and seize narcotics
15 and, specifically, methamphetamine; drug paraphernalia; cash or material goods tending to show profits
16 in dealing narcotics; telephone books, address books, and other records of narcotics transactions;
17 limited items of personal property tending to show the identity of persons in control of the premises;
18 firearms and ammunition; writings and other items relating to gang activity. The search warrant also
19 sought permission to search computer hardware, software, and related items.

20 Detective Meade's affidavit related that beginning in the early part of 2005, he became aware
21 that Michael Yost resided in Pahrump. Meade knew Yost was involved in the Aryan Warriors, a
22 Nevada prison gang. During this period of time, he observed Yost "hanging around with" Jeff
23 Martindale who was also known to be involved with the Aryan Warriors. Meade knew Yost was living
24 at 5920 Vicki Ann Road and that Martindale lived at 5911 Vicki Ann Road in Pahrump. In the early
25 part of 2005, Meade began working with an investigator from the state Inspector General's Office,
26 William Reubart, who was assigned to the Nevada prison system. Meade and Reubart exchanged
27 information that a number of Aryan Warriors "were currently paroling to Pahrump." Reubart told
28 Meade that Yost was a suspect in a case involving heroin, methamphetamine, marijuana, and

1 hypodermic devices being smuggled into the Nevada prison system for Charles Axtell, an individual
2 affiliated with the Aryan Warriors.

3 On July 23, 2005, the Nye County Sheriff's Office ("NCSO") received a report of shots fired in
4 the 5900 block of Vicki Ann Road. Meade informed responding deputies at the scene of possible gang
5 activity based on his knowledge that Yost and Martindale lived across the street from each other.
6 Meade went to the scene and discovered Martindale was the shooter and had fled on foot. Meade
7 obtained a search warrant for Martindale's residence. The search warrant recovered evidence of the
8 shooting and numerous items pertaining to prison gang activity. Among the items recovered were
9 letters written to Martindale from Yost, indicating Yost would help Martindale get established once he
10 paroled. There were other letters written to Martindale from another inmate, Brian Mathieson, who was
11 affiliated with white supremacist prison gang activity. Photographs of Yost and Martindale together
12 were also recovered inside Martindale's residence. As a result of his investigation, Meade obtained a
13 warrant for Martindale's arrest.

14 Martindale was later killed by Boulder City Police in a shootout. However, while Meade was
15 looking for Martindale, Meade was aware that Martindale and Yost had been very close friends and
16 "the word on the street was that they were selling narcotics." Redacted portions of the affidavit referred
17 to information provided by a confidential informant. The unredacted portion of the affidavit reflects
18 Meade asked the informant whether he or she knew of any Aryan Warriors paroled in Pahrump. The
19 informant identified Mike Yost. The informant described Yost as a "shot caller" on the prison yard.
20 Meade described a "shot caller" as someone who runs or controls a certain yard in a prison system. The
21 informant told Meade that Yost has always been involved in narcotics and was very involved in dealing
22 narcotics while inside prison. The informant told Meade that individuals were selling drugs for
23 themselves and that the rest of the drugs and money "went to the benefit of the Aryan Warriors
24 organization."

25 Meade's affidavit described the Aryan Warriors as a "blood in, blood out" organization, *i.e.*,
26 members join forever. Meade related that if an inmate paroled from prison, he is expected to obtain and
27 sell drugs on the street and get them into prison for his incarcerated brothers. Paroled inmates are also

28 ///

1 expected to commit crimes to put money on the books of incarcerated brothers and carry out assaults,
2 beatings, murders, *et cetera*.

3 Detective Meade related that on August 14, 2005, he received information Yost was being
4 arrested for a parole violation. He went to the detention center to interview Yost to find out where
5 Martindale was hiding. Yost told Meade that he would tell Meade where Martindale was if Meade got
6 him out of jail. Meade did not believe Yost would provide information about where Martindale was
7 hiding if Yost was released. Meade took photographs of wizard and Viking tattoos on Yost, stating
8 they are "very popular amongst white supremacists." Meade observed a tattoo on Yost's right arm,
9 with sharp pointed lightning bolts which he recognized as a tattoo that is usually earned from an
10 organization like the Aryan Warriors for committing an act of extreme violence against a rival
11 organization. During the interview, Yost acknowledged knowing Aryan Warriors from his number of
12 years in prison.

13 On June 28, 2006, Inspector Reubart came to Pahrump and delivered a disk to Meade of
14 intercepted calls between Axtell, who was in prison, and Yost. Some portions of the calls were
15 "heavily coded," but in other parts of the calls, Axtell and Yost were clearly talking about narcotics.
16 Meade related the substance of two telephone conversations in the affidavit and stated that during the
17 conversation, Yost mentioned using his computer. Meade stated that some of the conversation was
18 clearly code for manufacturing methamphetamine. Numbers and exchanges were discussed. Axtell and
19 Yost also talked about another inmate who was a "an old Aryan Warrior" and one of the best customers
20 of another inmate incarcerated with Axtell.

21 Meade's affidavit related Yost's criminal history which included arrests and convictions dating
22 from 1972 through 1987 for various offenses, including multiple narcotics related offenses, as well as
23 burglary, theft, bad check charges, possession of stolen vehicle, parole violation, fugitive charges, and
24 conviction for robbery with use of a deadly weapon. In 1987, Yost was sentenced to consecutive terms
25 in the Nevada state prison for armed robbery, released, rearrested for violation of parole, and sentenced
26 to finish his sentence. Yost had been recently released from a Nevada state prison on this charge a few
27 months prior to the time the affidavit was prepared.

28 ///

1 Meade related that Yost was married to Debra Yost. A check with the Nye County Assessor's
2 Office listed Yost and his wife, Debra, as co-owners of the residence at 5920 Vicki Ann Road in
3 Pahrump. Debra Yost's aliases and extensive criminal history were related.

4 Meade described the Aryan Warriors as a violent organization "made up of the worst of the
5 worst of the white convicts in Nevada's prison system." Paroled members stay loyal to the organization
6 and have access to drugs and money on the street which they smuggle in to incarcerated members to be
7 sold. The earnings of outside drug sales are placed on the books of incarcerated members to make their
8 life easier. Incarcerated members are involved in murder, extortion, violent batteries, drug dealings,
9 and internet scams. Meade related two examples of "hundreds of violent incidences" he was aware of
10 over the years involving Aryan Warriors who were sent to prison from Pahrump. He was aware of an
11 Aryan Warrior who violently beat an Aryan Warrior who had dropped out of the organization and was
12 working with law enforcement. He was also aware that while Martindale was in prison, he stabbed
13 another inmate and beat two corrections officers who sustained lifelong injuries. Meade was aware
14 Aryan Warriors were heavily populating Pahrump after being paroled.

15 The affidavit relied upon information provided by Reubart concerning intercepted letters and
16 phone calls at the prison in which Aryan Warriors had talked about activities in Pahrump by members
17 paroled or discharged. Meade's affidavit stated that he believed Yost was currently involved in
18 narcotics trade and that letters and other writings to and from Aryan Warrior members would be located
19 inside the residence. He believed that these writings would contain "extremely important intelligence
20 as to possible criminal activity that paroled members are partaking in, where members are living, who
21 Yost is staying in contact within the inside, etc." He also stated he believed that evidence may exist to
22 "further establish the Yost/Axtell drug connection." He described the searched premises and requested
23 that the affidavit be sealed to protect the confidential informant. He also asked for authorization for
24 nighttime service. Judge Brisebill found probable cause and issued the search warrant for the items
25 requested.

26 ANALYSIS

27 Neither side provided the court with a copy of the search warrant return or an inventory of items
28 seized from the searched premises. The search warrant sought judicial authorization to search for and

1 seize evidence of narcotics violations and, specifically, narcotics violations related to the Aryan
2 Warriors prison gang. Reviewing the affidavit as a whole, applying the totality of the circumstances
3 test, and showing the issuing judge great deference as mandated by the United States Supreme Court,
4 this court concludes the issuing judge had a substantial basis for concluding probable cause existed for
5 the issuance of the search warrant. As the Supreme Court in Gates recognized, “only the probability,
6 not a *prima facie* showing of criminal activity, is the standard of probable cause.” 462 U.S. at 235. The
7 evidence presented to Judge Brisebill, taken as a whole, established the probability that evidence of
8 narcotics violations and ties with the Aryan Warriors prison gang would be found in the searched
9 premises. The affidavit failed to establish probable cause to believe firearms and ammunition would be
10 found in the searched premises. The affidavit contains no information tying Yost to firearms or
11 ammunition at all. The only references to firearms in the affidavit concerned Meade’s investigation of
12 Martindale for a shooting at Martindale’s residence across the street from Yost and the recovery of
13 “evidence of a shooting” from a search warrant executed at Martindale’s residence. However, it does
14 not appear that any firearms and ammunition were seized in the search.

15 The government provided a description of items that were seized in the search in its response.
16 The government’s opposition indicates Detective Meade seized correspondence with prison inmates; a
17 “fraudulent letter” written to the Nevada Parole Board Commissioner by Debra Yost, using the false
18 name Debra Young; inmate photographs and drawings; address books containing the names of several
19 known members of the Aryan Warriors and their associates; phony “legal mail stickers” and attorney
20 address labels; false Nevada drivers licenses bearing alias names and fake social security numbers;
21 cleared and uncleared fraudulent checks; fraudulent drivers license templates; fraudulent Nevada
22 identification and drivers license cards; and several blank check templates. The government also
23 indicates Detective Meade seized a plastic baggie containing methamphetamine and a prescription pill
24 bottle with the name Patrick Hays, containing Naproxen; paint thinner; fifty-two bottles of antifreeze;
25 numerous photographs of Michael and Debra Yost; a computer hard drive; a Yamaha quad with an
26 altered vehicle identification number; and a boat and trailer with no vehicle identification number.

27 Yost argues that the affidavit lacked probable cause to authorize a search for items of personal
28 property tending to establish the identity of persons in control of the residence but does not otherwise

1 challenge the scope of the search warrant. “The scope of a lawful search is ‘defined by the object of the
2 search.’” United States v. Ewain, 88 F.3d 689, 692 (9th Cir. 1996), quoting Maryland v. Garrison,
3 480 U.S. 79, 84 (1987). The test is an objective one: “would a reasonable officer have interpreted the
4 warrant to permit the search at issue.” United States v. Gorman, 104 F.3d 272, 274 (9th Cir. 1996).

5 The Ninth Circuit has held that “[i]t is axiomatic that if a warrant sufficiently describes the
6 premises to be searched, this will justify a search of the personal effects therein belonging to the person
7 occupying the premises if those effects might contain the items described in the warrant.” United States
8 v. Gomez-Soto, 723 F.2d 649, 654 (9th Cir. 1994). The Ninth Circuit has long upheld warrants
9 “authorizing the seizure of items which establish the identity of persons in control of the premises.”
10 United States v. Whitten, 706 F.2d 1000 (9th Cir. 1983); citing United States v. Marques, 600 F.2d 742,
11 751 n. 5 (9th Cir. 1979), cert. denied, 444 U.S. 1019 (1980).

12 In Whitten, the Ninth Circuit upheld that a search warrant authorizing the seizure of telephone
13 books, diaries, photographs, utility bills, telephone bills, and any other types of papers indicating the
14 ownership or occupancy of the residence. The trial court found there was probable cause to search two
15 residences for evidence of a methamphetamine laboratory. The Ninth Circuit upheld the trial court’s
16 denial of a motion to suppress, finding probable cause supported the warrant and rejecting the
17 defendant’s claim that the search for the records described was impermissibly broad. The Court of
18 Appeals held that “where multiple defendants were suspected to have utilized the premises as a
19 laboratory and headquarters for a large-scale illegal drug operation, it was reasonable to authorize the
20 arresting agents to search for evidence showing who occupied and controlled the premises.” Id. at
21 1009.

22 From the government’s description of the items seized from the searched premises, it appears
23 that a number of items not specifically authorized in the warrant were seized. Neither side addressed
24 this issue in their moving or responsive papers, although the government’s response suggests some of
25 the items were seized under the plain view exception. The plain view doctrine is an exception to the
26 search warrant requirement and permits seizure of items of evidence if the police have probable cause
27 to believe an item is evidence after an inspection of “what is already exposed to view.” Arizona v.
28 Hicks, 480 U.S. 321, 322 (1987). In Hicks, a police officer was lawfully on the defendant’s premises

1 and moved stereo components, which he had reasonable suspicion but not probable cause to believe
2 were stolen, in order to view the components' serial numbers. The Supreme Court concluded that this
3 movement was a search, and held that the plain view doctrine could not justify the search or seizure of
4 the components because the police lacked probable cause to believe they were stolen. In holding that
5 probable cause was necessary to justify the search of the components and the subsequent seizure, the
6 court stated there was no reason why an item found in plain view could be seized on "lesser grounds . . .
7 than would have been needed to obtain a warrant for that same object if it had been known to be on the
8 premises." Id. at 327-29. Similarly, in Minnesota v. Dickerson, the Supreme Court reiterated that for
9 the plain view doctrine to justify a seizure, the incriminating nature of an object must be apparent. The
10 court explained that the incriminating nature of the object is immediately apparent if police have
11 probable cause to believe an object in plain view is contraband. 508 U.S. 366, 375 (1993). See also
12 United States v. Garcia, 205 F.3d 1182, 1187 (9th Cir.), cert. denied, 531 U.S. 856 (2000) ("The 'plain
13 view' exception requires: (1) that the initial intrusion must be lawful; and (2) that the incriminating
14 nature of the evidence must be immediately apparent to the officer.") (citation omitted).

15 The court cannot determine from the moving and responsive papers what evidence the
16 government intends to introduce at trial or whether the plain view doctrine justifies the seizure of all of
17 the items seized in this case. Specifically, the court has no information regarding whether any evidence
18 was seized from Yost's computer. Similarly, the court has no information concerning how officers
19 determined one of the vehicles had an altered serial number or that the boat and trailer seized had no
20 vehicle identification number. The court, therefore, recommends that before the government seeks to
21 introduce evidence at trial not specifically identified in the search warrant, the government should be
22 required to establish that the evidence was found where officers were lawfully authorized to be during
23 the execution of the search warrant and that the incriminating nature of the evidence was immediately
24 apparent to seizing officers.

25 Finally, Yost claims that the information supporting this search warrant was too stale to support
26 a finding of probable cause. The court disagrees. The affidavit related information derived from an
27 investigation which spanned from the beginning of 2005 through June 28, 2006 that Yost and members
28 of the Aryan Warriors were engaged in ongoing narcotics trafficking. The Ninth Circuit has held that in

1 evaluating the staleness of information supporting a search warrant “mere lapse in time is not
2 controlling.” United States v. Dozier, 844 F.2d 701, 707 (9th Cir. 1988). The Ninth Circuit has also
3 held that “the continuous nature of the activity diminishes the significance of the time lag between
4 the acts described in the affidavit and presentation of the affidavit to the magistrate.” United States v.
5 Landis, 726 F.2d 540, 542 (9th Cir. 1984). See also United States v. Hernandez-Escarsega,
6 886 F.2d 1560, 1566 (9th Cir. 1989) (“where affidavits established the existence of a widespread,
7 firmly entrenched, and ongoing narcotics operation in which the defendant was a key player, staleness
8 argument lost much of its force”).

9 Here, Detective Meade’s affidavit related Yost’s association with the Aryan Warriors, a “blood
10 in, blood out” prison gang whose members are expected to remain members for life. The affidavit
11 detailed the relationship between incarcerated and paroled members of the Aryan Warriors and their
12 participation in narcotics trafficking, both in and out of prison, for the benefit of individual members
13 and the organization. Detective Meade listened to telephone conversations recorded between Yost and
14 co-defendant Charles Axtell, who is also a member of the Aryan Warriors, on June 28, 2006, the same
15 day the warrant was applied for and issued. Although portions of the calls were “heavily coded,”
16 Detective Meade averred that the conversations related to manufacturing methamphetamine. The court
17 finds that the information provided in the search warrant was not so stale that the issuing judge lacked a
18 substantial basis for issuing the warrant.

19 The government argues that even if the search warrant in this case was “flawed,” the good faith
20 exception precluded suppression of evidence derived from the search of Yost’s residence. In United
21 States v. Leon, 468 U.S. 897 (1984), the United States Supreme Court held that the exclusionary rule
22 should not bar evidence obtained by officers acting in reasonable reliance on a search warrant issued by
23 a detached and neutral magistrate, but ultimately found to be unsupported by probable cause. Adopting
24 a good faith reliance test, the Supreme Court reasoned that the rationale for the Fourth Amendment
25 exclusionary rule was to deter unlawful police conduct. If, after reviewing an affidavit and application
26 for a search warrant, an issuing judge incorrectly concludes the affidavit states probable cause, the
27 mistake is made by the judge not the police officer. Since the purpose of the exclusionary rule is not
28 furthered by the exclusion of evidence taken under circumstances in which it is the judge, rather than

1 the police officer, who makes the mistake, the officer's "good faith" in applying for the search warrant
2 precludes suppression of evidence as long as the officer's reliance on the warrant was objectively
3 reasonable. Evidence seized pursuant to a facially valid search warrant which later is held to be invalid
4 may nevertheless be admissible if officers conducting the search acted in "good faith" and in reasonable
5 reliance on the warrant. Leon, 468 U.S. at 926. Thus, evidence seized pursuant to a search warrant in
6 this case is admissible, even if the issuing judge erred in finding probable cause under the Leon "good
7 faith" doctrine.

8 Leon recognized four circumstances in which the "good faith" doctrine would not apply to avoid
9 suppression. They include: (1) where the issuing magistrate was misled by information in the affidavit
10 which was knowingly or recklessly false; (2) where the issuing magistrate had abandoned the detached
11 and neutral judicial role; (3) where the affidavit was so lacking in probable cause as to render official
12 belief in its existence entirely unreasonable; or (4) where the warrant is so facially deficient in failing to
13 particularize the place to be searched or things to be seized that the executing officers could not
14 reasonably presume it to be valid.

15 Yost claims the search warrant lacked probable cause and was so deficient the issuing judge
16 abandoned her neutral and detached role. The court has found that the issuing judge had a substantial
17 basis for concluding probable cause existed for the issuance of this search warrant for evidence of
18 narcotics violations and ties with the Aryan Warriors prison gang. The court has also found that the
19 search warrant lacked probable cause to believe that firearms or ammunition would be found in the
20 searched premises. However, it does not appear that firearms or ammunition was seized. Moreover,
21 assuming officers did seize firearms or ammunition from the Yost residence because they were aware
22 he was a convicted felon, any seizure that occurred in a place where the officers were lawfully
23 authorized to be by virtue of the search warrant would be justified under the plain view exception.

24 Yost's arguments that officers could not search for and seize evidence establishing the identity
25 of persons in control of the premises is clearly contrary to established Ninth Circuit law. The
26 government's description of items seized during this search does suggest that certain items not
27 specifically authorized in the warrant were seized. Based on the description of some of the items, for
28 example, false Nevada drivers' licenses bearing alias names and fake social security numbers and

1 cleared and unaltered fraudulent checks, fraudulent driver's license templates, and fraudulent Nevada
2 identification and driver's license cards and blank check templates, the government may have a valid
3 argument that the plain view doctrine justified their seizure. The court simply cannot determine from
4 the parties' briefs what items of evidence the government intends to introduce at trial and whether the
5 plain view doctrine applies. The court will, therefore, recommend that the government be required to
6 disclose to defense counsel thirty days prior to trial what specific items of evidence seized in the search
7 of Yost's residence the government intends to introduce at trial, and for those items not specifically
8 authorized by the search warrant, what exception to the search warrant requirement permits the
9 introduction of the evidence not specifically authorized to be seized.

10 Having reviewed and considered the matter,

11 **IT IS THE RECOMMENDATION** of the undersigned United States Magistrate Judge that
12 Yost's Motion to Suppress (Dkt. #422) be DENIED.

13 **IT IS FURTHER RECOMMENDED** that the government be required to disclose to counsel
14 for Yost, thirty days before trial, which of the items seized during the search of his residence at
15 5920 Vicki Ann Road the government intends to introduce at trial to enable counsel for Yost to object
16 to the introduction of the evidence on Fourth Amendment grounds.

17 **IT IS FURTHER RECOMMENDED** that before the government be permitted to introduce
18 any evidence seized from Yost's residence not specifically authorized in the description of items to be
19 seized in the search warrant that the government be required to establish that the plain view exception
20 to the warrant requirement justified the seizure of these items of evidence.

21 Dated this 26th day of March, 2009.

22
23 
24 PEGGY A. LEEN
25 UNITED STATES MAGISTRATE JUDGE
26
27
28